

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the Applications of)	
)	
PAUL R. LIKINS)	File Nos. 9600002, 9600013 & 9600014
)	
To Provide 39 GHz Point-to-Point Microwave)	
Service in the Areas of Lorain, Ohio, Colorado)	
Springs, Colorado and Santa Rosa, California)	

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 2000

Released: November 30, 2000

By the Commission:

1. The Commission has before it two Applications for Review filed by Paul R. Likins (Likins) on May 1, 2000. Likins requests Commission review of two *Orders*¹ by the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division (Division) dismissing the above-captioned applications for authorization to provide service in the 38.6 to 40.0 GHz (39 GHz) band.²

2. We have analyzed the Applications for Review and find that the Commission staff properly decided the matters raised. The Commission has established and affirmed a processing policy concerning 39 GHz channels that includes the dismissal of (a) applications that failed to meet the thirty-day public notice requirement as of November 13, 1995; (b) all new applications, major modification applications and amendments filed on or after November 13, 1995; and (c) applications whose mutual exclusivity was not resolved by December 15, 1995 and amendments resolving mutual exclusivity that were filed on or after December 15, 1995.³ In addition, the Commission's Rules provide for the dismissal

¹ Paul R. Likins, *Order*, DA 00-713, (PSPWD WTB rel. Mar. 30, 2000); Paul R. Likins, *Order*, DA 00-716 (PSPWD WTB rel. Mar. 30, 2000).

² See Paul R. Likins, Application for Review, FCC File Nos. 9600002, 9600014 (filed May 1, 2000); Paul R. Likins, Application for Review, FCC File No. 9600013 (filed May 1, 2000).

³ See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18639-45 ¶¶ 83-97 (1997); *aff'd* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12440-51 ¶¶ 19-44 (1999).

of mutually exclusive applications and late-filed competing applications.⁴

3. The above-referenced applications were dismissed because they violated the 39 GHz processing policy. Specifically, the Lorain, Ohio application⁵ was mutually exclusive with an application filed by AT&T Wireless PCS, Inc. and filed beyond the sixty-day cutoff date established by that application. Similarly, the Santa Rosa, California application⁶ was mutually exclusive with an application filed by Bay Area Teleport, Inc. and filed beyond the sixty-day cutoff date established by that application. Moreover, the Colorado Springs, Colorado application⁷ had not satisfied the thirty-day public notice requirement as of November 13, 1995. In addition, a portion of the Colorado Springs application was mutually exclusive with an application filed by GHz Equipment Company and filed beyond the sixty-day cutoff date established by that application. Therefore, we uphold the staff decision for the reasons stated therein. There is no reason to disturb it.

4. In the alternative, Likins requests a stay of the *Orders*,⁸ pending the completion of a multi-party appeal of the 39 GHz policies currently before the United States Circuit Court for the District of Columbia.⁹ To receive a stay of an administrative action a party must show that: 1) it will suffer irreparable harm if the stay is not granted, 2) it is likely to prevail on the merits of its appeal, 3) the grant of stay will not harm the other interested parties, and 4) the grant would serve the public interest.¹⁰ Likins argues that a stay of the *Orders* would serve the public interest by eliminating the need for duplicative litigation and remove uncertainties as to the availability of the subject frequency assignments with respect to the conflicting rights that may attach as a result of the 39 GHz auction.¹¹ We disagree.

5. First, the plain language of the test to receive a stay of a Commission action provides that a stay request shall be granted only upon a finding that all four conditions are satisfied.¹² Thus, where any one of the four conditions is not satisfied, the subject request will not be granted. Likins fails to address the first three prongs of this test. As a result, Likins cannot satisfy the requirements for a stay.

6. Second, Likins argues that the public interest benefits support the grant of a stay in this

⁴ See 47 C.F.R. § 21.31 (b)(2)(i) (1995); 47 C.F.R. § 101.45(b)(2)(i) (disposition of mutually exclusive applications). See also 47 C.F.R. § 1.934 (dismissal of defective applications).

⁵ FCC File No. 9600002.

⁶ FCC File No. 9600014.

⁷ FCC File No. 9600013.

⁸ Paul R. Likins, *Order*, DA 00-713, (PSPWD WTB rel. Mar. 30, 2000); Paul R. Likins, *Order*, DA 00-716 (PSPWD WTB rel. Mar. 30, 2000).

⁹ See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidating Case Nos. 99-1361 and 99-1362).

¹⁰ See *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958), as revised by the *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

¹¹ See Application for Review, FCC File Nos. 9600002, 9600014 at 5-6; Application for Review, FCC File No. 9600013 at 5-6.

¹² See *Washington Gas v. FERC*, 758 F. 2d 669 (D.C. Cir. 1985).

matter. Again, we disagree. We are not persuaded that Likins' alleged injuries are sufficient to warrant a stay. In this connection, we note that consolidating this matter with the related proceedings before the court would not be duplicative. Moreover, if Likins wholly prevails in its judicial appeal of the Commission's decision, then we would "forthwith give effect thereto."¹³ Finally, we believe that reinstating Likins' applications would frustrate the underlying 39 GHz proceeding and "could lead to results inconsistent with our intent . . . to update the regulatory structure of the 39 GHz band in light of contemporary market conditions."¹⁴

7. In light of the above, we find that Likins has not shown any injury warranting injunctive relief.¹⁵ Accordingly, we deny Likins' request for a stay of the *Orders*.

8. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Applications for Review filed by Paul R. Likins on May 1, 2000 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹³ See 47 U.S.C. § 402(h).

¹⁴ July 29 *MO&O*, 14 FCC Rcd at 1437-38; Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 12 FCC Rcd 2910, 2917 ¶ 15 (1997); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rulemaking and Order*, 11 FCC Rcd 4930, 4988-89 ¶¶ 121-124 (1996).

¹⁵ *Washington Gas v. FERC*, 758 F.2d at 669.